

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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Court of Appeals of the District of Columbia.

JANUARY TERM, 1920.

No. 3355.

628

LEO L. FOLTZ, APPELLANT,

John Barton Payne vs.

~~FRANKLIN K. LANE~~, SECRETARY OF THE INTERIOR,
AND CLAY TALLMAN, COMMISSIONER OF THE GEN-
ERAL LAND OFFICE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

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Court of Appeals of the District of Columbia.

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FRANKLIN K. LANE, SECRETARY OF THE INTERIOR,
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ERAL LAND OFFICE, APPELLEES.

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Court of Appeals of the District of Columbia.

No. 3355.

LEO L. FOLTZ, Appellant,

vs.

FRANKLIN K. LANE, Secretary, &c., et al.

a Supreme Court of the District of Columbia.

In Equity. No. 35677.

LEO L. FOLTZ, Plaintiff,

vs.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN,
Commissioner of the General Land Office, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the *the* Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1

Amended Bill.

Filed June 27, 1919.

In the Supreme Court of the District of Columbia.

In Equity. No. 35677.

LEO L. FOLTZ, Plaintiff,

vs.

FRANKLIN K. LANE, Secretary of the Interior, and CLAY TALLMAN,
Commissioner of the General Land Office, Defendants.

To the Justice of the Supreme Court of the District of Columbia
Holding an Equity Court:

Comes now the plaintiff by his counsel and permission of the Court having been first received, brings and files this, his Amended

Bill of Complaint, against Franklin K. Lane, Secretary of the Interior and Clay Tallman, Commissioner of the General Land Office and shows unto Your Honor as follows:

I.

That he is over the age of twenty one years, a citizen of the United States, a resident of the State of Montana, qualified to take the benefits of the homestead laws of the United States and brings this suit in his own right, as hereinafter set forth.

II.

That the defendant, Franklin K. Lane is the Secretary of the Interior of the United States, and that the defendant Clay Tallman is the Commissioner of the General Land Office of the United States, and that each said defendant is sued in his official capacity
2 as Secretary of the Interior and Commissioner of the General Land Office, respectively, as hereinafter set forth.

III.

That on or about November 5, 1914, one Rosie Grasswick filed in the United States Land Office at Great Falls, Montana, a relinquishment of her entry under the desert land laws of the United States of Lot 3 and the South Half of the Northwest quarter of Section four in Township twenty-eight North, Range two West, Montana Meridian, in the State of Montana and thereupon, and as provided in section 1 of the act of Congress of May 14, 1880 (21 Stat. 140), the said land became subject to appropriation by others under the public land laws of the United States generally and was on said date entered under the provisions of the homestead laws of the United States by one Clementine A. Shaw.

IV.

That on April 29, 1916, Leo L. Foltz, the plaintiff herein, duly tna Meridian, in the State of Montana and thereupon, and as pro-affidavit of contest against the said homestead entry of Clementine A. Shaw, the purpose of such affidavit of contest being (1st) to effect cancellation of the Shaw entry upon grounds and for reasons specifically set out in such affidavit of contest and constituting a charge of non-compliance with law by said Shaw under said entry, and (2nd) to acquire for this plaintiff the preference right of entry of said land which is conferred on successful contestants by section 2 of the Act of Congress of May 14, 1880, supra. That on May 27, 1916, and while such affidavit of contest was pending, the said Shaw relinquished her said entry. That on the date and at the

3 instant of such relinquishment the plaintiff herein was in actual occupancy of the said land and was duly qualified to enter and appropriate same under the homestead laws and then desired so to enter and appropriate it and that to effectuate such desire he did, on May 27, 1916, file in the United States Land Office at Great Falls, Montana, his duly executed application to enter the filing of such application being made subsequent to the filing of relinquishment of the Clementine A. Shaw homestead entry. That such application for homestead entry of said land by this plaintiff was tendered and filed in exercise of his earned and vested right of preference of entry as a successful contestant under said section 2 of said act of Congress as that section has been expounded and administered in and by numerous decisions of the Department of the Interior.

V.

That the defendants have arbitrarily denied recognition to, and have refused to respect and sustain, plaintiff's vested right under section 2 of the said act of May 14, 1880, as a preference claimant and applicant for said land, and have arbitrarily denied recognition to, and have refused to respect and sustain, plaintiff's vested right under section 3 of said act of May 14, 1880, to an entry of said land as the first and only settler thereon subsequent to the filing of relinquishment by Clementine A. Shaw.

VI.

That the defendants rest their arbitrary denial of plaintiff's said vested rights and their refusal to respect and sustain same upon stated grounds which are plainly invalid and meritless in law and devoid of warrant or sanction from any concept or principle of equity, such pretended grounds and reasons being set out in
4 this bill, some of them being rulings by the defendants to this effect, to wit,

(a) That the said lands have been subject to the lien of a mortgage thereof to one Ebenezer G. Ranney continually since July, 1910, when such mortgage was executed by one Emil Grasswick who at that time claimed the said land under an unperfected desert land entry thereof, notwithstanding the complete abandonment and relinquishment by Emil Grasswick of such entry on December 16, 1910, before he had earned a right to patent thereunder.

(b) That the lien of such mortgage continued from December 16, 1910 to April 26, 1911, notwithstanding the fact that during such period the land was unentered by anyone.

(c) That the next subsequent entry of said land, which was an entry thereof on April 26, 1911, under the desert land laws by Rosie Grasswick, wife of Emil Grasswick, in her individual right, was affected by and was subject to the claim and rights of the said mortgagee of Emil Grasswick because and for the reason that the said Rosie Grasswick had, when the land was claimed under a desert entry in the individual right of Emil Grasswick, her husband,

joined with him in the execution of the said mortgage to the said Ranney for the purpose of waiving and releasing her dower rights, or other rights as a married woman under the laws of Montana, in and to said land.

(d) That by thus releasing her contingent rights in and to lands which might have passed into the private ownership of Emil Grasswick, her husband, but which never did, and which are now and always have been the exclusive property of the United States, Rosie Grasswick disabled herself to enter the same lands in the exercise of her individual right under the desert statutes without incurring liability under the mortgage executed by Emil Grasswick, her husband, to said Ranney.

(e) That the said mortgagee, by reason of such mortgage, had the right to meet and fulfill any requirements of the law relating the desert entry of Rosie Grasswick which she either did not desire to meet and fulfill or could not, and that any default by her with respect to any legal requirement essential to completion of her entry and the establishment of a right to patent thereunder could be cured by the action of said Ranney, notwithstanding said Ranney's status was that of a mortgagee of Emil Grasswick with land entered by him and expected to be acquired by him in his individual right under the public land laws as security for the mortgage, and not that of a mortgagee of Rosie Grasswick with land entered by her and expected to be acquired by her in her individual right under the public land laws as security for the mortgage.

(f) That Rosie Grasswick's relinquishment of her said desert entry, which relinquishment was made on November 5, 1914, had no effect whatever on the alleged lien of the mortgage on said land and that such lien was not affected by the next subsequent entry of the land which was made on November 5, 1914, by Clementine A. Shaw, under the homestead laws of the United States, immediately after the filing of Rosie Grasswick's relinquishment.

(g) That the relinquishment on May 27, 1916, by Clementine A. Shaw of her homestead entry, following the filing of a contest against same by this plaintiff on April 29, 1916, was without effect on the alleged lien of the mortgage and that because of the alleged lien of said mortgage this plaintiff did not, and could not, acquire any right or interest in and to the land by reason of his said contest against the Clementine A. Shaw entry or by reason of his settlement on the land at the time of relinquishment of that entry or by reason of his application to enter the land which was tendered and filed by him on May 27, 1916.

(h) That Ebenezer Ranney, mortgagee of Emil Grasswick, was entitled to have the desert entry of Rosie Grasswick reinstated in order that said Ranney might be afforded an opportunity to comply with a requirement essential to the validity of such entry which requirement the General Land Office was enjoined by law to make and impose and which it did make and impose in and by a letter of that office of October 5, 1914, and that Ranney was so entitled notwithstanding the fact that he was never a mortgagee under Rosie Grasswick's entry, and there was never any privity between him and

Rosie Grasswick under the latter's entry, and notwithstanding the vested right of entry of the land acquired by this plaintiff under his contest against the Clementine A. Shaw entry, under his occupancy of and settlement upon the land at the time of relinquishment of Shaw's entry and under his application to enter filed May 27, 1916, as aforesaid.

(i) That while the power to reinstate canceled public land entries for the benefit of innocent transferees or mortgagees of entrymen is an equity power of the Secretary of the Interior which he must not exercise to the prejudice of adverse claims and rights under the public land laws which have vested in third parties, there could be no claims or rights superior to the claim of Ranney under the mortgage from Emil Grasswick, as the lien of that mortgage remained a continuing valid lien on public land of the United States and enabled Ranney to enforce it as against any person entering the same land under the public land statutes subsequent to a relinquishment of the entry of the claimant who executed such mortgage to Ranney.

VII.

That on October 5, 1914 the General Land Office made a requirement with respect to the water alleged to be used by Rosie Grasswick in irrigating the land entered by her, she having sworn that the water was furnished her from a water company in which she held and owned water stock, and allowed said Grasswick thirty days from notice for compliance. That the requirement so made was—

“to furnish evidence that a court of competent jurisdiction has recognized the said share of stock as evidencing a legal interest in and to the Teton County Reservoir and Canal Company, and that said decision has become final, or to furnish other stock not in dispute as evidence of a water right, or to apply for an extension of time within which to submit the aforesaid evidence as part of the final proof submitted on her desert land entry.”

That the requirement aforesaid was made after Rosie Grasswick, who had never submitted an annual proof under her desert entry, had made a final proof thereunder, such final proof having been submitted on January 6, 1913. That the final proof aforesaid was accepted as sufficient by the Register and Receiver of the United States Land Office at Great Falls, Montana and on January 22, 1913 the said Register issued a certificate of final entry to said Grasswick. That in the final proof aforesaid it was sworn by Rosie Grasswick that she was the owner of sufficient stock in the Teton County Canal and Reservoir Company to entitle her to water for irrigation of the land entered by her from the water system of said company and that such stock was “acquired by purchase. Maintained by labor. Costing \$1,300. Sixty acre feet volume.”

That the requirement by the General Land Office as aforesaid was made after the final proof and final certificate under the Rosie Grasswick entry had come before that office for adjudication as to

the sufficiency and validity of the proof, and such requirement was made in a decision by the General Land Office holding the Rosie Grasswick entry for cancellation. That in such decision, and in connection with the statement of the requirement therein as aforesaid, it was also said

"One thousand shares of stock of the Teton County Canal and Reservoir Company had been issued in an irregular manner, and that the company has received no recompense for the same, and that these shares of stock are still in private hands, but that the company did not intend to recognize them until the question of the legality of the ownership of the same was decided in the courts. * * *

"The examiner furnishes a list of the shares of stock still under dispute and among the same is stock certificate number 2528 issued to T. C. Withee for forty shares of the capital stock of the Teton County Canal and Reservoir Company. This is the same certificate of stock that is claimed by Rosie Grasswick as evidence of her water right from the Teton County Canal and Reservoir Company. This share of stock cannot be accepted."

That the requirement aforesaid was a direct proceeding against the desert entry of Rosie Grasswick and challenged and brought into question both the truthfulness and sufficiency of said Grasswick's final proof—and the validity of the Register's final certificate of entry which had issued thereunder. That such requirement was made and such proceeding was instituted before the expiration
9 of two years from date of issue of the Receiver's final receipt under said entry. That it was essential to the confirmation of said entry for patent under the proviso to section 7 of the act of March 3, 1891 (26 Stat. 1095) and to the issue of patent thereunder that full compliance be made with such requirement. That it is an indispensable and mandatory requirement of the desert land statutes that it be affirmatively shown by claimants thereunder that they are the owners in their own right of a supply of water sufficient to irrigate the lands entered and claimed by them.

VIII.

That after failure by Rosie Grasswick to take any action whatever under said requirement and decision of the General Land Office of October 5, 1914, and subsequent to cancellation of her entry on relinquishment thereof by her and nearly two years thereafter, to wit, on September 11, 1916, the General Land Office by a decision of said latter date indicated it would order reinstatement of the Rosie Grasswick entry if Ranney, the mortgagee of Emil Grasswick, would comply with a requirement which was stated by the General Land Office in these terms—

"Ranney will be required to show that the stock certificate filed in connection with desert land entry 021702 has been recognized by a court of competent jurisdiction, as evidencing a legal right in and to the Teton County Reservoir and Canal Company, and that the decision of the Court has become final, or to furnish other stock in

said company, not in dispute, as evidence of water right in connection with desert land entry 021702."

That in pretense of compliance with the foregoing requirement the said Ranney filed in the General Land Office a letter dated September 2, 1916 from J. A. McDonough, Esq., who signed as "Attorney for the Teton County Canal & Reservoir Company and the Valier-Montana Land & Water Company," addressed to Chas. H. Campbell, Great Falls, Montana, agent for Ranney, in which letter there appears this statement—

10 "Replying to your inquiry of recent date, regarding certificate number 2528 originally issued in the name of T. O. Withee, I will say that the Teton County Canal & Reservoir Company contested the validity of this certificate, together with others in similar situation, but as a result of a compromise settlement the validity of this certificate number 2528 was afterward recognized by the Teton County Canal & Reservoir Company, and also the Valier-Montana Land & Water Company."

IX.

That on December 18, 1916 the General Land Office, in and by a decision of that date, arbitrarily declared that the said letter from J. A. McDonough to Chas. H. Campbell constituted full and complete compliance with both the requirement said office made on October 5, 1914 when it held the Rosie Grasswick entry for cancellation and the requirement it made on September 11, 1916 when it unlawfully afforded Ranney, as mortgagee of Emil Grasswick, an opportunity to obtain reinstatement of said entry, the following being an exact quotation from said decision of December 18, 1916, to wit:

"The statement by the attorney of the Teton County Canal & Reservoir Company, that certificate number 2528 is now recognized as valid by said company, considered in connection with other facts disclosed by the record is deemed to be satisfactory compliance with the requirement made by office decision of October 5, 1914. * * * The said relinquishment is hereby rejected and desert land entry 021702 is hereby reinstated."

That the said decision of December 18, 1916 was unauthorized, and unlawful and was an arbitrary attempt by a public officer to waive compliance with a statutory requirement under the desert land acts and was an arbitrary vacating of an official order which it was the mandatory duty of the Commissioner of the General Land

Office to have obeyed and respected by a desert entry claimant or anyone claiming under such claimant.

11 That the said decision of December 18, 1916 was an arbitrary judgment to the effect that said letter from said McDonough to said Campbell constituted proof that Rosie Grasswick was the owner of stock in said company at the date of her final proof and that the said stock certificate 2528 had been recognized by said Company as a valid interest in said company at and during the time it was in the possession of T. O. Withee and at and during the time Rosie Grasswick claimed it was owned by her. That said decision

of December 18, 1916 arbitrarily reinstated the Rosie Grasswick entry and arbitrarily dismissed as meritless those claims of this plaintiff to the land in question which are referred to hereinbefore.

That from the said decision of December 18, 1916 this plaintiff duly appealed to the Secretary of the Interior who on June 7, 1917 affirmed the said decision of the General Land Office of December 18, 1916.

X.

That thereupon this plaintiff filed a motion for rehearing under the decision of the Secretary of the Interior of June 7, 1917 affirming the judgment of the General Land Office. That on August 13, 1917 the Secretary of the Interior entertained such motion by a decision of that date holding that the said letter from J. A. McDonough to C. H. Campbell was insufficient to fulfill the requirements made under the rulings of the General Land Office of October 5, 1914 and September 11, 1916, aforesaid, and that the judgment of the General

Land Office of December 18, 1916 declaring the Rosie Grass-
12 wick entry confirmed for patent under the proviso aforesaid, and the decision of the Secretary of the Interior of June 7, 1917 affirming such judgment were both erroneous.

That in and by the decision entertaining this plaintiff's motion for rehearing the Secretary of the Interior laid a rule on Ranney demanding of him proof of all the alleged facts and circumstances of the alleged compromise settlement under which said company was alleged to have recognized the validity of the purported share of stock under which Rosie Grasswick, as she had sworn, became entitled to water from the works of the said Company, it being expressly imposed upon Ranney by said rule to present "a duly verified showing * * * setting forth in detail all the facts and circumstances in the matter, supported by a copy of the agreement whereby the controversy respecting said stock was compromised."

That neither this plaintiff nor his counsel was served with copy by the Department of the Interior of its said decision of August 13, 1917 entertaining the motion for rehearing. That on being advised of said decision, otherwise than by service of a copy thereof, counsel for this plaintiff filed motion in the office of the Secretary of the Interior for an order on Ranney to serve this plaintiff or his counsel with copy of whatever showing Ranney filed in the Department of the Interior in obedience to the rule laid on him in said decision of August 13, 1917. That in acting on such motion the Secretary of the Interior, on September 1, 1917, by letter of that date to this plaintiff's counsel, stated:

13 "That the Department does not deem it necessary or expedient, that such showing be served on Foltz or his attorney at this time. If upon examination of the showing called for, when made, consideration thereof may affect the rights of your client, you will be given ample opportunity to explain or refute it."

That thereafter a showing was made by Ranney without service of copy thereof on this plaintiff or his counsel. That without granting to this plaintiff or his counsel any "opportunity to explain or refute"

such showing the Secretary of the Interior, treating as ex parte a case which had for years theretofore progressed in his Department as a proceeding inter parties, did on November 27, 1917, and by his decision of that date, deny this plaintiff's motion for rehearing and held (a) that the Rosie Grasswick entry had been confirmed for patent under said proviso, and (b) "that the mortgagee (Ranney) is entitled to have issued a patent for the entry (the Rosie Grasswick entry) in the name of the entry-woman."

That the said decision of the Secretary of the Interior of November 27, 1917 was based wholly upon evidence which that officer invited one of the parties to the cause to inject into the record without notice to the other and which said officer considered and acted upon without according to Foltz or his counsel an opportunity to be heard with respect to it, notwithstanding the written promise of the Secretary of the Interior to counsel for Foltz that "if upon examination of the showing called for, when made, consideration thereof may affect the rights of your client, you will be given ample opportunity to explain or refute it." That the Secretary of the Interior denied to this plaintiff the benefits of due process of law when said Secretary, in entering a motion for rehearing filed by this plaintiff to
 14 correct errors in a decision rendered by said Secretary on an appeal to that officer by this plaintiff from a judgment of the Commissioner of the General Land Office, invited and permitted the adversary of this plaintiff to introduce new and different evidence, and to make a new and different record, without according and insuring to this plaintiff a day in court with respect to such new and different evidence and new and different record.

XI.

That the showing made by Ranney in response to the rule laid on him in and by the Secretary's decision of August 13, 1917 entertaining and sustaining this plaintiff's motion for rehearing was, on its face, unresponsive to said rule, was patently in evasion of the command of said rule, was insufficient, misleading, deceitful and false, was an attempt to practice an imposition upon the Department of the Interior and has been successful as such attempt, at least up to this time, and in no wise and in no manner and to no extent met or fulfilled the requirements made in the decisions of the General Land Office of October 5, 1914 and September 11, 1916, aforesaid.

That before the Secretary of the Interior acted upon such showing, counsel for Foltz twice in a formal way and by two letters to the Secretary of the Interior which were received by him, admonished that officer that the showing was false and that its falsity could be demonstrated to the Department of the Interior if said Department would but permit counsel for Foltz "to explain or refute it" by filing with the Department of the Interior certain officially and duly certified
 15 copies of judicial proceedings and certain affidavits by the J. A. McDonough hereinbefore referred to and by officers of the Teton County Canal and Reservoir Company, and other papers, all of which, then in the possession of said counsel, would ef-

fectually protect the Department of the Interior against the fraud and imposition practiced by Ranney in the showing he made in answer to the rule. That these two warnings or notices to the Department of the Interior which were given to it in and by the said two letters to it from counsel for this plaintiff were disregarded by said Department and answers thereto were never made by said Department.

XII.

That availing of the right to petition the Secretary of the Interior to exercise his supervisory authority in matters within his jurisdiction, and out of a desire to protect the Department of the Interior against its own mistakes as well as against the fraudulent and deceptive designs and acts of Ranney, this plaintiff, subsequent to denial of his motion for rehearing, which denial rests on Ranney's ex parte showing and nothing else, filed in the Department of the Interior a petition for exercise of the Secretary's supervisory authority and attached to and made a part of such petition the papers hereinafter described. That such papers fully refute and demonstrate as being designedly false and misleading the showing made by Ranney which consisted only of an affidavit by the President of the Teton County Canal and Reservoir Company and an unsworn statement by Chas. H. Campbell, agent for said Ranney.

16 That such President expressly admits in his said affidavit that he makes it after inspection by him of "a photographic copy of a certified copy of stock certificate 2528", which had been presented to him by said Campbell, agent of Ranney, and not after reference by such President to the records of his company concerning said stock certificate. That in such affidavit such president swore that the decree in a case in the courts of Montana entitled Bogart v. Teton County Canal and Reservoir Company validated said certificate 2528 as a lawful interest in said company. But in neither said affidavit by said President nor in said unsworn statement by said Campbell will there be found any averment in accordance with the material facts of record in the courts of Montana and on the records of said company concerning said certificate.

That the papers attached to this plaintiff's said petition for exercise of supervisory authority presented a complete refutation of the showing made by Ranney such papers being described here as follows, to wit:

(a) An affidavit by J. A. McDonough alleging that he is attorney for the Teton County Canal and Reservoir Company; that he wrote the letter referred to hereinbefore in this bill of complaint with no thought or intimation that it would be used as it was used before and in the Department of the Interior; "that as he has no direct personal knowledge even at this time as to the actual disposition of certificate Number 2528, or the delivery of water thereunder, he respectfully asks leave to withdraw from the files of the Department his said letter of September 2, 1916 addressed to C. H. Campbell and Son, or else that it be held for naught in the consideration of the case in connection with which it was presented";

17 (b) An affidavit by J. C. Brostron, Assistant Secretary
of the Teton County Canal and Reservoir Company alleging
that certificate of stock 2528 is in the files of the said company and
that it bears no notation of having been applied to the land described
in this bill of complaint; that neither Emil nor Rosie Grasswick is
shown by the records of the company to have been holders of stock
therein at any time either by purchase or assignment from others;
that said certificate 2528 appears (by the records of the company)
to have been issued on May 13, 1910, partially in lieu of certificate
number 130 and was surrendered to the Company for cancellation on
May 29, 1915 by one T. O. Withee and that on said date a new cer-
tificate in lieu thereof was issued to Gust Hower; that said certificate
2528 "shows no evidence of having been issued to anyone except T.
O. Withee, and the memorandum of assignment by T. O. Withee to
Gust Hower, on the back thereof, shows no evidence of alterations
or erasures therein;" that "said company's records do not disclose
that Rosie or Emil Grasswick ever owned stock certificate number
2528, of said company, or claimed any interest or right therein to
my knowledge"; that the transfer from Withee to Hower was exe-
cuted January 26, 1915; that said new certificate was made appurte-
nant to lands other than those described in this bill of complaint;
that the records of the company show no payment to it by anyone
for issuance of certificate 2528 and no payment by any holder of
such certificate, or anyone, at any time, of charges assessed annually
by said company against such outstanding certificate; that no one was
recognized by the company as an owner of said certificate
18 until Gust Hower was recognized as such owner on May 29,
1915.

(c) Copies certified by Clerk of the District Court, Eighth Judi-
cial District, for the County of Cascade, State of Montana, of the
pleadings in Gust Hower v. Teton County Canal & Reservoir Com-
pany, showing that Hower, the transferee of Withee, instituted suit
on January 30, 1915 to obtain a decree compelling said company to
treat him as a stockholder therein under his purchase of said stock
certificate 2528 from Withee which he alleged he purchased "in
good faith without any knowledge whatever of conflicting interests"
and that he is "an innocent purchaser and the owner and holder of
said stock for value and without notice" and that before bringing of
suit the company had refused to recognize said certificate 2528 as
valid. Such copies show that on May 12, 1915 the company filed
answer alleging fraudulent issue of certificate 2528 to T. O. Withee
by officers of the company without any consideration whatever to
the company and that on April 6, 1917 said suit was dismissed be-
cause not prosecuted. That said pleadings show that the company
had always refused to recognize certificate 2528 as valid and had
never furnished water thereunder, and that said certificate had been
issued to T. O. Withee in fraud of the company. The pleadings
further show Hower claiming as an innocent purchaser of the certi-
ficate from Withee without notice of its having been issued in fraud
of the company.

(d) Transcript certified by the Judge of the District Court, Eighth Judicial District, for the Counties of Cascade, Teton and Toole, Montana, of the testimony taken in the suit by Ebenezer G. Ranney v. Emil Grasswick, et al., to foreclose under the Ranney mortgage referred to hereinbefore in this bill of complaint, said transcript reporting the court as saying "I don't know anything about the case", and "I don't know what the suit is about." (The final decree in this foreclosure suit was signed by the said Court January 28, 1915.)

(e) Copies certified by Clerk of the District Court, Eighth Judicial District, in and for Cascade County, Montana, of the pleadings and decree in E. S. Bogart v. Teton County Canal and Reservoir Company which is the suit referred to in that affidavit of the President of said Company which Ranney caused to be obtained and filed in the Department of the Interior in answer to the rule which was laid on Ranney by the Secretary of the Interior in and by that officer's decision of August 13, 1917, aforesaid. That while in said affidavit by said President it is alleged that the decree in said suit validated stock certificate 2528 it is shown by the pleadings and decree in said suit that said stock certificate was not involved therein. The pleadings in said suit show it to have been instituted by Bogart as an innocent purchaser for value of certain certificates of stock, but not certificate 2528, which had been stolen by T. O. Withee from the Company. The decree shows that no stock other than what Bogart acquired was affected by the decree.

(f) That numerous other duly authenticated copies of judicial records accompanied said petition for exercise of supervisory authority all of which showed that neither Rosie nor Emil Grasswick ever at any time made a purchase of stock certificate 2528 from T. O.

Withee or from any other person and that certificate 2528 was never recognized as valid at any time or in any one before May 28, 1915 when, as the result of a suit by Gus Hower as an innocent purchaser without notice, said certificate was canceled by the Company and another in lieu thereof issued to Hower.

XIII.

That notwithstanding this plaintiff's said petition and the irrefragable proof of the falsity of the showing made by Ranney, which proof accompanied said petition, the Secretary of the Interior did, on December 21, 1917, dismiss such petition, did adhere to his decision of November 27, 1917 denying this plaintiff's motion for rehearing and did hold, treat and regard such irrefragable proof of the falsity in the respect aforesaid as without effect to cause him to recede from his groundless ruling that Ranney had by and through such showing fully met and complied entirely with the requirements made in the decisions of the General Land Office of October 5, 1914 and September 11, 1916 as aforesaid, and with the requirement made in the decision of the Secretary of the Interior of August 13, 1917, as aforesaid. That there is an utter absence of any evidence whatever in the files of the Land Department of compliance by Ranney or by

anyone else with any of the several requirements aforesaid and that notwithstanding this fact and with full knowledge thereof the Secretary of the Interior has taken the action herein described and against which this plaintiff here complains.

That the Commissioner of the General Land Office is now taking the steps leading up to the issue of patent under the Rosie Grasswick desert entry for the use and benefit of said Ranney, the mortgagee of Emil Grasswick, under another and different entry, and that unless said Commissioner is promptly restrained from so doing by this Court such patent will issue and this plaintiff will be effectually deprived of this vested right to an entry of said land as public land of the United States under the acts of Congress relating to the public domain by the arbitrary acts of the defendants, the said Commissioner and the said Secretary.

XIV.

That at the time Emil Grasswick relinquished his desert land entry, the said entry being the security for the mortgage executed by said Emil Grasswick to said Ebenezer G. Ranney, the said Emil Grasswick had not earned a patent under said entry by compliance with the desert land laws; and it has never been contended by said Ranney and has never been found by said Commissioner or by said Secretary that there had been such compliance by Emil Grasswick.

XV.

And this plaintiff says that he has now completely exhausted his rights of appeal, review, rehearing, and petitioning in the Department of the Interior, and in the General Land Office, in respect of his vested right under and by reason of his preference of entry as a successful contestant against the Clementine A. Shaw entry, as well as under and by reason of his settlement upon and his application for the land hereinbefore described, and that no further opportunity for hearing or review of the questions aforesaid, or for the further assertion of his claims, is afforded under the rules of practice before said Department, and that his only remaining remedy is by appropriate appeal to the courts for relief from the erroneous findings of fact and rulings in matters of law as aforesaid which findings and rulings, as this plaintiff is advised, and, accordingly, avers, are entirely arbitrary.

XVI.

And this plaintiff further says that, by his full and complete compliance with all the requirements of the law and regulations of the Department of the Interior with respect to his contest against the Clementine A. Shaw entry as well as his said settlement and said application his right to an entry of the land here in question is accrued and vested; but that, nevertheless, such accrued and vested right is sought to be defeated by the unauthorized and arbitrary ac-

tion of the said Commissioner and the said Secretary, as hereinbefore stated.

XVII.

And this plaintiff further states that if the certain actions by the said Commissioner and the said Secretary hereinabove set forth be permitted to stand, they will deprive this plaintiff of his vested right under laws of Congress, to wit. the act of May 14, 1880, *supra*, and homestead laws of the United States, all to his irreparable loss, damage, and injury and for which he has no adequate remedy at law, and is otherwise remediless, except in equity.

Wherefore, the premises considered the plaintiff herein prays:

1. That said Franklin K. Lane, Secretary of the Interior, and Clay Tallman, Commissioner of the General Land Office, be made parties defendant hereto, be served with process, and be required to answer the exigencies of this bill.

23 2. That, upon the filing of this bill, or at such short day thereafter as shall be fixed by the Court, a preliminary order may issue herein restraining and enjoining, *pendente lite*, the said Clay Tallman and the said Franklin K. Lane, their successors in office, and each, every and all persons claiming to act under their, or either of their, authority or control, from enforcing any or either of the certain findings, rulings, holdings and decisions mentioned and complained of in the foregoing bill of complaint, or from issuing a patent of the United States under the said Rosie Grasswick desert land entry for the land hereinbefore described or from taking any action whatever with view to effectuating any of the certain findings, rulings, holdings and decisions mentioned and complained of in the foregoing bill.

3. That, upon final hearing, said restraining order and injunction may be made perpetual, and that mandatory injunction may issue against said defendants, Franklin K. Lane and Clay Tallman, commanding and requiring that each of the certain findings, rulings, holdings and decisions aforesaid so far as they adjudge that Ebenezer G. Ranney has wholly met and fully complied with the requirements of the decisions of October 5, 1914 and September 11, 1916 of the Commissioner of the General Land Office and the decision of August 13, 1917 of the Secretary of the Interior and so far as said rulings, holdings and decisions adjudge the Rosie Grasswick desert land entry to be confirmed for patent under the proviso to Section 7, of the Act of March 3, 1891, *supra*, be vacated and set aside and that thereafter the settlement and application of this plaintiff, as well as his preference right, as aforesaid, be examined and adjudged in the exercise of the legal discretion of
24 the said Clay Tallman and Franklin K. Lane, excluding from any and all consideration in connection with this plaintiff's said preference right, his settlement and application the rulings, holdings and decisions of said defendants mentioned and complained of in the foregoing bill of complaint.

4. And that this plaintiff may have all such other and further

relief as the nature of his case may demand and require and as may be agreeable to equity.

LEO L. FOLTZ,
By PATRICK H. LOUGHRAN,
Attorney in Fact.

PATRICK H. LOUGHRAN,
Attorney for Plaintiff,
Washington, D. C.

The Defendants to This Amended Bill of Complaint are:

1. Franklin K. Lane, Secretary of the Interior.
2. Clay Tallman, Commissioner of the General Land Office.

DISTRICT OF COLUMBIA, ss:

I, Patrick H. Loughran, attorney in fact for Leo L. Foltz, do solemnly swear that I have read the foregoing bill of complaint by me subscribed as attorney in fact for said Leo L. Foltz and know the contents thereof, that the matters and things therein stated on personal knowledge are true and those stated on information and belief I believe to be true.

PATRICK H. LOUGHRAN.

Subscribed and sworn to before me this 25th day of June, 1919.
[SEAL.] ADELAIDE SPRECKELMYER,
Notary Public, D. C.

25

(Endorsed.)

June 27, 1919.

Leave to file granted with leave to defendants to plead as may be advised within ten days.

WILLIAM HITZ,
Justice.

Motion to Dismiss.

Filed July 3, 1919.

* * * * *

Come now the defendants, by their attorneys, and, with leave of court first thereunto obtained in the order allowing leave to file plaintiff's amended bill of complaint, move to dismiss said bill of complaint both as originally filed and as amended; and for cause show:

1. That the same involve and require, before the relief prayed or any relief may be granted, the review by this court as on appeal of certain decisions and actions of the defendants made and taken in a matter involving the disposition of public land of the United States, committed by law exclusively to them to hear and determine;

that the same involve the exercise of judgment and discretion; that the same involve not only the determination of questions of law but questions of fact; and that the trial of this suit involves the review of the defendants' decisions and determination of questions of fact as well as of law.

2. That the bill fails to show any irreparable injury or damage sustained or to be sustained by the plaintiff.

3. That it appears on the face of the bill that plaintiff, if wronged by any decision or action herein complained of, has a complete and usual remedy to correct said alleged wrongs in a suit in a court of the vicinage against the patentee of the United States when
26 said patent shall have been issued.

4. That, as shown on the face of the bill, the suit involves title to real estate situate in the State of Montana, and the asserted right of plaintiff thereto and the rights therein and title thereto of one Ebenezer G. Ranney, mortgagee of the entrywoman Rosie Grasswick, and that said mortgage has been foreclosed as against said Grasswick by final decree of a court having jurisdiction in said State of Montana; that the granting of the relief sought would be in derogation or denial of said title and rights of said Ranney, in whose favor the defendants have decided the issues in the decision complained of in said bill; that by the original bill of complaint and in recognition of the right and interest of said Ranney in the subject matter of this suit, plaintiff sought to make said Ranney a party defendant; that as appears from the records of this court, said Ranney is a resident of the State of New York and was never personally served by process in this suit; that on or about April 5, 1918, as shown by the records of this court, and on representations made to this court by the plaintiff that said Ranney was not to be found within the District of Columbia or within the jurisdiction of this court, notice to said Ranney by publication was ordered in this suit; that thereafter and on June 21, 1918, on motion of counsel for said Ranney for that purpose specially appearing, this court vacated said order for service by publication on the ground that the immediate object of this suit being the enforcement or establishment of an alleged right, claim, or demand to or against real property not within the jurisdiction of this court, there was no authority of law for said purported service by publication; that by operation of said
order the suit is now without the presence of said Ranney
27 and that in the amended bill he is not made party hereto;
that said Ranney is a necessary and indispensable party, without whose presence the court is without jurisdiction to grant the relief sought by the bill of complaint or any relief to the plaintiff without thereby passing upon and adjudicating adversely the rights and interests of said Ranney in the land in controversy.

Wherefore they pray that the bill, original and amended, may be dismissed with their reasonable costs and that they may be permitted to go hence without day.

FRANKLIN K. LANE,
Secretary of the Interior.

CLAY TALLMAN,
Commissioner of the General Land Office.

By Their Attorneys: CHARLES D. MAHAFFIE,
Solicitor;
C. EDWARD WRIGHT,
Assistant Attorney.

Decree Dismissing Bill.

Filed November 24, 1919.

* * * * *

This cause came on to be heard on the defendants' motion to dismiss the plaintiff's bill of complaint as by leave of court heretofore amended and was argued by counsel; and the court being fully advised in the premises, it is this 24th day of November, 1919,

Ordered, adjudged and decreed, That the rule to show cause herein issued be and the same is hereby discharged, and that the bill of complaint be, and the same is hereby dismissed with costs to the defendants to be taxed by the Clerk.

By the Court:

WALTER I. McCOY,
Chief Justice.

28 And from the foregoing decree the plaintiff, on the day above mentioned, in open court noted an appeal to the Court of Appeals, and the same is hereby allowed, the bond of costs on appeal being fixed at \$100, with the privilege, in lieu thereof, of depositing the sum of \$50 with the Clerk of this court.

By the Court:

WALTER I. McCOY,
Chief Justice.

No objection as to form.

PATRICK H. LOUGHRAN,
Att'y for P'ff.

Stipulation.

Filed December 16, 1919.

* * * * *

It is hereby stipulated between counsel, this 12th day of December, 1919, that the parts of the record in the above-entitled suit essential to constitute the transcript on appeal are the amended bill of complaint, the motion to dismiss, and the decree dismissing the bill, and

that the following notations as to proceedings antecedent to the filing of the amended bill of complaint present a record thereof sufficient for the purposes of this appeal:

That the original bill of complaint, filed January 14, 1918, was in substance the same as the amended bill, but joined thereto as party defendant one Ebenezer G. Ranney, a citizen of the State of New York, he being the same Ranney mentioned in said amended bill;

That on April 5, 1918, plaintiff took out order of service by publication on said Ranney, and on May 28, 1918, due proof of publication was filed;

29 That on June 4, 1918, the said Ranney, specially appearing by counsel for that purpose only, moved that said purported service of process upon him be vacated and set aside for the reason that the suit had as its immediate object the establishment of an alleged right to real estate situate in the State of Montana and not in the District of Columbia and that there was no authority of law for said purported service by publication;

That on June 21, 1918, the Supreme Court of this District granted the foregoing motion and vacated said service on said Ranney;

And that thereafter, on June 27, 1919, with leave of court first obtained, the plaintiff filed his amended bill of complaint, in substitution for said original bill of complaint, and thereafter the defendant filed his motion to dismiss.

PATRICK H. LOUGHRAN,
Attorney for Plaintiff.
C. EDWARD WRIGHT,
Attorney for Defendant.

Memorandum.

December 16, 1919.—Appeal bond approved and filed.

Assignment of Errors.

Filed December 16, 1919.

* * * * *

The appellant assigns the following errors in the decision and decree of the Court in the above entitled suit:

I. The Court erred in holding that it was without jurisdiction to grant the prayers of the amended bill upon those allegations
30 of fact therein which were well pleaded and which were in nowise questioned, but on the contrary admitted to be true, by the defendants' motion to dismiss.

II. The Court erred in failing to apprehend that on the amended bill and the motion to dismiss same it was shown that the Secretary of the Interior had denied due process of law to Foltz in that said Secretary's decision of August 13, 1917, by which Foltz's motion for rehearing was entertained, as set out in paragraph X of the amended bill, arbitrarily permitted and invited Ranney to make a new and different record in a proceeding to which Foltz was a party, and to make such new and different record in a manner wholly ex

parte and without right in Foltz to be heard as to the new matter Ranney might inject into the proceeding in pursuance of such arbitrarily given and made permission and invitation.

III. The Court erred in failing to apprehend that on the amended bill and the motion to dismiss same it was shown that the Secretary of the Interior had wilfully and arbitrarily deprived Foltz of his right to question the new matter injected into the proceeding subsequent to entertainment of the motion for rehearing, in that while the Secretary's letter of September 1, 1917 to counsel for Foltz, as set out in paragraph X of the amended bill, alleged that Foltz would be allowed a hearing as to such new matter in event it was found to affect his rights, the Secretary thereafter, and without a previously granted opportunity to Foltz to be heard, although the denial of such opportunity was a gross violation of the stipulation made in his said letter of September 1, 1917, declared such new matter sufficient to affect the rights of Foltz even to the extent of compelling
31 the Secretary to hold those rights to be inferior to the claims of Ranney.

IV. The Court erred in failing to apprehend that on the amended bill and the motion to dismiss same it was shown that the Secretary of the Interior had wilfully and arbitrarily accepted as compliance with a mandatory requirement of statute law that "evidence of water right in connection with" the Rosie Grasswick desert entry be furnished, a certain sworn statement, which is referred to in paragraphs XI and XII of the amended bill, to the effect that a certificate of stock numbered 2528 in a certain water company, which certificate Rosie Grasswick had alleged she owned, had been decreed a valid certificate in certain proceedings in a Court in Montana, the willfulness and arbitrariness of the Secretary in that regard being evident from the fact that before he made such acceptance he had been twice notified in a formal manner by counsel for Foltz, as set out in paragraph XI of the amended bill, that such counsel had in his possession a duly authenticated transcript of the said proceedings in the Montana Court which constituted irrefutable proof of the falsity of the aforesaid sworn statement and that such counsel would offer same for the consideration of the Secretary of the Interior if permitted to do so, such notification and such tender of proof from Foltz, although a party claiming adversely to Ranney in a regular proceeding in the Department of the Interior, being deliberately ignored and undutifully disregarded by the Secretary of the Interior.

V. The Court erred in failing to apprehend that on the amended bill and the motion to dismiss same it was shown that the defendants
32 had arbitrarily relieved Ranney from compliance with a mandatory provision of the desert land acts of Congress which it was their, the defendants', sworn duty to enforce, viz., that provision of said acts which was the subject of the requirement imposed with respect to the Rosie Grasswick entry by the decision of the General Land Office of October 5, 1914, as set out in paragraph VII of the amended bill, as re-imposed by the decision of said Office of September 11, 1916, as set out in paragraph VIII of the amended bill and as re-affirmed by the ruling of the Secretary of the Interior of August 13, 1917, as set out in paragraph X of the amended bill.

VI. The Court erred in failing to apprehend that on the amended bill and the motion to dismiss same it was shown that the Secretary of the Interior had wilfully committed a wrong against Foltz as well as the people and government of the United States in persisting in his declaration that the sworn statement alleging that a certain certificate of water stock had been decreed valid by a court in Montana both fulfilled the requirement for "evidence of water right in connection with" the Rosie Grasswick entry and placed the Land Department under the compulsion of the proviso to section 7 of the act of March 3, 1891 (26 Stat. 1095) of issuing a patent under the Rosie Grasswick entry, the wilfulness and arbitrariness of the Secretary of the Interior in that regard being evident from the fact that Foltz, after having been unlawfully and arbitrarily denied an opportunity of questioning at the proper time and in accordance with due process the new matter brought into the proceeding by Ranney, presented to the Secretary's notice subsequent to the first announcement of such declaration the documentary proof set out in paragraph XII of the amended bill, which established beyond reasonable doubt the entire falsity of such new matter, the Secretary, however, 33 rejecting such proof and arbitrarily holding that it in nowise either disproved such new matter or showed that the requirement for "evidence of water right in connection with" Rosie Grasswick's entry had not been complied with.

VII. The Court erred in failing to apprehend that on the amended bill and the motion to dismiss same it was shown (1st) that after December 16, 1910 (on which date Emil Grasswick voluntarily relinquished his entry) and until April 26, 1911 (when Rosie Grasswick made entry), the public land was unentered by anyone, (2d) that from April 26, 1911 until November 5, 1914 the public land was covered by the desert entry of Rosie Grasswick, (3rd) that from November 5, 1914 until May 27, 1916 the public land was covered by the homestead entry of Clementine A. Shaw, and that the defendants arbitrarily held that a loan of money made by Ranney to Emil Grasswick in July 1910, with the entry of the public land in the latter's individual right as the only security therefor, persisted and survived as an enforceable lien on the public land from July 1910 and for all time thereafter until released or discharged.

VIII. The Court erred in failing to apprehend that on the amended bill and the motion to dismiss same it was shown that the claim to or interest in the public land acquired by Ranney, the mortgagee, was never greater than the claim or interest of Emil Grasswick, the mortgagor, under the latter's entry of the public land, and that as said Emil Grasswick voluntarily relinquished his entry before earning title to the public land thereunder it was grotesque arbitrariness for the defendants to have held that the public land continually thereafter was encumbered by said mortgage to the extent that a subsequent claimant for such land, who made 34 entry thereof in his or her sole right, necessarily assumed toward Ranney that relation of mortgagor which Emil Grasswick had once assumed and also was charged with the obligation of satisfying the Emil Grasswick mortgage to Ranney.

IX. The Court erred in failing to apprehend that on the amended bill and the motion to dismiss same it was shown that on April 29, 1916 Foltz duly filed an application to contest the then subsisting homestead entry of the public land by Clementine A. Shaw, that on May 27, 1916 the said Shaw relinquished her entry and that the defendants, have arbitrarily denied to Foltz the exercise and enjoyment by him of the preference right of entry of the public land conferred on successful contestants by section 2 of the act of Congress of May 14, 1880 (21 Stat. 140), it being the law as uniformly interpreted and enforced by the defendants that the relinquishment of an entry subsequent to the filing of a contest against it is conclusively presumed to have been induced by such contest and will vest in the contestant the preference right of entry of the land provided for in the act of 1880, supra.

X. The Court erred in failing to apprehend that on the amended bill and the motion to dismiss same it was shown that Foltz was qualified to take the benefits of the settlement laws with respect to the public domain, that he was in actual occupancy of the said public land and had his place of residence thereon at time of extinguishment of Clementine A. Shaw's entry by her relinquishment thereof, that on May 27, 1916, within the period prescribed by section 3 of the act of May 14, 1880 (21 Stat. 140) for the assertion of the preference right of entry of actual settlers, as well as within the period
35 prescribed by law for exercise of the preference right of a successful contestant, he duly filed an application to make homestead entry of the public land, and that the arbitrary acts and decisions of the defendants have disregarded and sought to destroy Foltz's vested right of entry as an actual settler and his vested right of entry as a successful contestant.

PATRICK H. LOUGHRAN,
Attorney for Plaintiff.

Designation of Record.

Filed December 16, 1919.

* * * * *

In preparing transcript of the record on the appeal of the plaintiff in the above entitled suit, the Clerk of the Court will please to include therein the following:

1. The amended bill of complaint.
2. The motion of the defendants for dismissal of the amended bill of complaint.
3. The decree, the notation of appeal and stay of execution and also the order fixing amount of appeal bond for costs, or deposit of cash in lieu of such bond.
4. Stipulation of counsel as to proceedings antecedent filing of amended bill of complaint.
5. The assignment of errors.

6. Memorandum of approval of bond for costs.
7. This designation.

PATRICK H. LOUGHRAN.

Service of copy of the foregoing acknowledged this 16th day of December, 1919.

C. EDWARD WRIGHT,
Attorney for Defendants.

36 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 35, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 35677 in Equity, wherein Leo L. Foltz is Plaintiff and Franklin K. Lane, Secretary of the Interior and Clay Tallman, Commissioner of the General Land Office are Defendants, as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 2nd day of January, 1920.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG,
Clerk,

By W. E. WILLIAMS,
Assistant Clerk.

Endorsed on cover: District of Columbia Supreme Court. No. 3355. Leo L. Foltz, appellant, vs. Franklin K. Lane, Secretary, &c., et al. Court of Appeals, District of Columbia. Filed Jan. 13, 1920. Henry W. Hodges, clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

~~MAR 15 1920~~

IN THE

Henry W. Hodges.
clerk

**Court of Appeals
of the District of Columbia**

JANUARY TERM, 1920.

—
No. 3355
—

LEO L. FOLTZ, APPELLANT,

vs.

FRANKLIN K. LANE, SECRETARY OF THE INTERIOR,
AND CLAY TALLMAN, COMMISSIONER OF THE
GENERAL LAND OFFICE, APPELLEES.

—
APPEAL FROM THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA.
—

BRIEF AND ARGUMENT FOR APPELLANT.
—

PATRICK H. LOUGHRAN,
Mills Bldg., Washington, D. C.,
Attorney for Appellant.

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GENERAL LAND OFFICE, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE
DISTRICT OF COLUMBIA.

BRIEF AND ARGUMENT FOR APPELLANT.

This case was tried below on the motion of defendants (appellees) for dismissal of plaintiff's (appellant's) amended bill. The Court discharged the rule to show cause and decreed the bill dismissed. An appeal brings the case to this Court.

Statement of the Case.

The motion of defendants for dismissal of plaintiff's bill challenged and denied the jurisdiction of the Court below and was based upon stated grounds substantially as follows:

1st. That the bill was an attempt to restrain the defendants from giving effect to their judgment and discretion in the "determination of questions of fact as well as of law" in a matter "committed by law exclusively to them to hear and determine," and therefore the Court below was without jurisdiction to afford relief by injunctive process, regardless of the character of wrongs which an exercise of "judgment and discretion" by the defendants might have inflicted upon the plaintiff.

2nd. That the bill failed to show that an irreparable injury or damage would be sustained by the plaintiff in event the prayers of the bill were not granted, and therefore the Court below was impotent to restrain or enjoin the defendants, notwithstanding the fact that they might have denied enjoyment by plaintiff of rights given him by acts of Congress.

3rd. That "it appears on the face of the bill that plaintiff, if wronged by any decision or action" of the defendants, has an adequate and complete remedy under a different form of action and against different parties and in a forum in another jurisdiction and at some indefinite time in the future, and therefore the Court below, even if it apprehended in the bill a grievous wrong intended to be done the plaintiff by the de-

fendants, would exceed its powers if it attempted to prevent final perpetration of the wrong through issuance of an injunction.

4th. That, "as shown on the face of the bill, the suit involves title to real estate situate in the State of Montana" in which one Ebenezer G. Ranney has "title and rights"; that said Ranney "is a necessary and indispensable party", and therefore the Court below would assume to try a question as to title to land situated in the State of Montana and not a question as to whether deliberate disregard of law and contempt for due process characterized the conduct of the defendants, if it did aught else than dismiss the bill.

The Court below did not express its views on the merits of the motion to dismiss in a written opinion. It rejected the suggestion of counsel for the plaintiff that it consider the soundness or unsoundness of the stated grounds of the motion to dismiss in the light of whatever intelligence with respect thereto could be displayed by such counsel in a written memorandum by him thereon. At the close of the oral argument on behalf of all parties in the Court below, the said Court seemed entirely satisfied and fully convinced that justice under the law and in accordance with equity in our country was not so latitudinal as to permit the Supreme Court of the District of Columbia to entertain a bill to restrain and enjoin the officers of the Land Department under the facts presented by plaintiff and fully admitted under the defendants' motion to dismiss.

All that we can say with any degree of certainty as to the views of the Court below on the merits of any

of the stated grounds of the motion to dismiss is that said Court appeared to deem the first of said stated grounds sufficient. The first of such stated grounds has been the pretext from time immemorial for abuse of the people and their rights by executive officers, viz., that the acts complained against were performed in the exercise of "judgment and discretion". Our statement here as to the views of the Court are based upon the colloquy between said Court and counsel for plaintiff concerning the wilful refusal of the defendants (par. X of the bill, page 8 of the Record) to observe, follow and respect rule 83 of practice before their department in connection with the proceedings had in said department subsequent to the entertaining of plaintiff's motion for rehearing. It was the matter set out in said paragraph of the bill which the Court below seemed to deem the keystone of the structure of plaintiff's case, if he had any case. The Court below seemed to be of opinion that the wilful denial of due process to plaintiff in and by the land department, as set out in said paragraph of the bill, was rendered harmless by the fact that the plaintiff protested against same in a petition to the defendant Secretary of the Interior (par. XII of the bill, p. 10 of the Record) and that said officer of the Government, in acting upon such petition and exercising his "judgment and discretion" with respect thereto, adhered to, ratified and confirmed in all respects the action he had theretofore taken in disregard of due process. The court below apparently thought that by the protest to the defendant Secretary of the Interior against the wrong done plaintiff and the violence done to due process he, the plaintiff, thereby voluntarily submitted the wrong and the violence to the "judgment and discretion" of the

officer guilty thereof, and as that officer found and ruled that no wrong or violence was perpetrated by him his "judgment and discretion" in that regard were not reviewable by the judiciary in a proceeding for injunction.

This case should be especially interesting to this Court for the reason that heretofore it has had to consider mandamus and injunction proceedings which had for their objective compulsion upon the Secretary of the Interior to give effect to the proviso to Section 7 of the Act of March 3, 1891 (26 Stat. 1095). The instant case is one in which the plaintiff's bill shows that the Secretary of the Interior and the Commissioner of the General Land Office displayed haste, eagerness, recklessness, a tendency to ignore caution and proof and to throw judgment and discretion to the winds in a desire to spread upon their records a finding and ruling by them that a certain entry was within the proviso and that patent should and must issue under it.

The Court is familiar with the extremes to which the land department has gone in its attempts to effect a practical nullification or effacement from the statute books of the said proviso. In and by this case we acquaint the Court with the extremes to which that department does not hesitate to go when it wants to hold that the proviso is operative and has deprived it of all power except the power to issue patent.

In one other respect the case at bar is unusual. It is alleged in the bill that the Commissioner of the General Land Office and the Secretary of the Interior, with every opportunity to know the truth in a matter, chose to shut their eyes, stop their ears and numb their senses to the truth and to permit false swearing and

wilful misrepresentation to be the basis for action by them in disposing of a tract of public land. The allegations of the bill in that connection charge the defendants with something worse than making the facts of a case without evidence from which to infer or find the facts. It charges them with preferring falsehood over truth. It charges them with accepting as the facts in a matter statements of a character and from a source which would not be deemed dependable by a man in the street, to say nothing of a tribunal that is entrusted with the tremendous responsibility of administering a trust of such great wealth and importance to the well being of the present generation and future ones as the public domain. It charges that the Secretary of the Interior not only arbitrarily excluded from all consideration an overwhelming sworn contradiction of certain statements he chose to deem statements of facts for all the purposes of an adjudication of the conflicting claims of two citizens, but it alleges and shows that in the final stages of a proceeding before him he disregarded the rules of practice before his own department and so far outraged that basic principle of justice which is termed "due process" as to allow one of the parties to the proceeding to make, by an *ex parte* showing, a new and different record in the case, without according the opposite party a right to examine the new matter or to be heard with respect to it.

The facts in the case are only such facts as are alleged in plaintiff's bill, and they are these:—

That on November 5, 1914, one Rosie Grasswick duly relinquished her entry under the desert land laws of the United States of certain public lands in Montana (Par. III of Bill, p. 2 of Record).

That on the same date, and subsequent to acceptance of the Grasswick relinquishment, one Clementine A. Shaw made a homestead entry of the same land. (Par. III of Bill, p. 2 of Record.)

That on April 29, 1916, Leo L. Foltz, the plaintiff, duly contested the homestead entry of said Shaw. (Par. IV of Bill, p. 2 of Record.)

That on May 27, 1916, the said Shaw relinquished her said homestead entry. (Par. IV of Bill, p. 3 of Record.)

That on May 27, 1916, Foltz, the plaintiff, was in actual occupancy of said land and duly qualified to enter and appropriate same under the homestead laws and desired and intended so entering and appropriating it. (Par. IV of Bill, p. 3 of Record.)

That on May 27, 1916, Foltz, the plaintiff, duly filed an application to make homestead entry of said land. (Par. IV of Bill, p. 3 of Record.)

Instead of allowing Foltz's application for homestead entry and thus and thereby discharging a duty to permit him to effectuate his preference right of entry under the third section of the Act of May 14, 1880 (21 Stat. 140), as the first and only settler on the land, and his further and additional preference right under the second section of said act, as the successful contestant, the defendants, without taking a word of testimony, without the trial of any question of fact, but evidently suspecting and imagining Foltz to be a party to some plan or conspiracy to defraud, cheat or

otherwise injure one Ebenezer G. Ranney, the mortgagee of one Emil Grasswick, refused to permit enjoyment by Foltz, the plaintiff, of either of said two clearly acquired rights under the homestead laws of the United States.

The sole alleged grounds of such refusal by the defendants are set out fully in paragraph VI of the bill, (p. 3 of the Record) and are summarized here as follows, to wit:

I. That by reason of a mortgage of the land executed in July, 1910, by one Emil Grasswick (who then held the land under a desert entry in his sole name and sole right) to secure one Ebenezer G. Ranney for a loan of money to said Emil Grasswick, the land at all times thereafter continued subject to a lien in favor of such Ranney under and by virtue of such mortgage, or to an interest therein by him, notwithstanding relinquishment by Emil Grasswick of his entry on December 16, 1910, before he had acquired a right to patent by compliance with the law applicable to his entry, notwithstanding that the land was unentered by anyone from December 16, 1910, to April 26, 1911, notwithstanding that the land was covered by a desert entry in the sole name and sole right of Rosie Grasswick, wife of said Emil Grasswick, from April 26, 1911, to November 5, 1914, notwithstanding the fact that the land was covered by a homestead entry in the name of Clementine A. Shaw, from November 5, 1914, to May 27, 1916, and notwithstanding the accrued preference rights of entry of the land by Foltz, the plaintiff, under the second and third sections of the act of May 14, 1880, *supra*.

II. That the two preference rights of Foltz, the plaintiff, viz., his preference right as the successful contestant of the Clementine A. Shaw homestead entry and his preference right as the first and only settler on the land after relinquishment of the Shaw entry (rights which he acquired without the slightest notice of the dealings between Emil and Rosie Grasswick and Ebenezer G. Ranney, so far as the record here or in the land department shows), were in no sense or in way or manner such rights as the defendants were under any species of duty or obligation to respect and sustain, as against the desire of Ebenezer G. Ranney to avail of the opportunity, afforded by relinquishment of the Clementine A. Shaw homestead entry in 1916, to then advise the land department of his claim under a mortgage executed in 1910, and to seek from that department an adjudication that he was as much a mortgagee under the Rosie Grasswick entry as under the Emil Grasswick entry and as such entitled to have the Rosie Grasswick desert entry reinstated for the purpose of obtaining a patent thereunder to the end that the mortgage given by Emil Grasswick, with an unperfected desert entry by him as the security therefor, might be satisfied out of land entered by Rosie Grasswick in her individual right and to be patented to her, if ever to be patented to her, as her sole and separate property.

III. That as Rosie Grasswick had joined with her husband in execution of the mortgage to said Ranney she had thereby disabled herself to make entry of the land in her sole name and sole right (in event of relinquishment of her husband's entry), without subjecting her entry and the land covered thereby to her

husband's mortgage to Ranney to the same extent and with like effect as if such mortgage had been executed with her entry and with her intention to earn patent from the United States as security for the loan from Ranney, and not with Emil Grasswick's entry and with his intention to earn patent from the United States as such security.

IV. That the failure of Ranney, the mortgagee, to give timely notice to the Register and Receiver of his claim or interest as mortgagee of Emil Grasswick in the manner prescribed by rule 98 of practice before the land department (although the mortgage was executed in July, 1910, and said Grasswick did not relinquish his entry until April 26, 1911), and the failure of said Ranney to assert his claim as such mortgagee during the life of the Rosie Grasswick entry, or within the period from December 16, 1910, to April 26, 1911, when the land was unentered by anyone, or early in the life of the Clementine A. Shaw entry, in no wise sufficed to impute laches to said Ranney or to cause his claim to be inferior and subordinate to the two preference rights of Foltz, the plaintiff, who, so far as the record here or in the land department shows, instituted his contest against the Clementine A. Shaw homestead entry and settled upon the land in suit in absolute good faith and with no notice of the interest of Ranney as mortgagee.

V. That Ranney, the mortgagee of Emil Grasswick was, notwithstanding the two preference rights of Foltz, the plaintiff, entitled to make compliance for Rosie Grasswick in 1916 with a requirement which the General Land Office laid upon her on October 5, 1914, with respect to her entry, and that upon doing so to

have the Rosie Grasswick entry reinstated and patented. (As to the nature of the requirement, see paragraph VII of the Bill, p. 5 of the Record.) That the fact that Rosie Grasswick was notified of the requirement and rather than attempt to comply therewith chose to relinquish her entry on November 5, 1914, was immaterial. That Ranney, the mortgagee, did not display any disposition to meet such requirement until more than a year after relinquishment of Rosie Grasswick's entry also was immaterial. That while the said requirement was specific and definite and called for "evidence that a court of competent jurisdiction has recognized the said share of stock as evidencing a legal interest in and to the Teton County Reservoir & Canal Company," such requirement was fully met by an unsworn statement in a letter from one McDonough to one Chas. H. Campbell, which is set out in paragraph VIII of the Bill, page 7 of the Record, and which was afterwards described by said McDonough in an affidavit by him filed in the land department as never intended as testimony by him as to the history of such stock certificate. (See the third sub-paragraph of paragraph XII of the Bill, p. 10 of the Record.) That production and filing of such letter from McDonough to Campbell entitled Ranney to a ruling that it met and fulfilled such requirement for "evidence." That as such requirement was the only thing by way of a protest or contest against the Rosie Grasswick entry which had been made within two years subsequent to issue of Receiver's receipt to her, it followed from the filing of the McDonough to Campbell letter that said entry was confirmed for patent under the proviso to section 7 of the Act of March 3, 1891 (26 Stat. 1095) and that the land de-

partment was without jurisdiction or power to do aught else than issue patent, notwithstanding the two preference rights of Foltz, the plaintiff.

VI. That while counsel for Foltz was convincing in his argument that the defendant Secretary of the Interior had erred in affirming the judgment of the defendant Commissioner of the General Land Office that the McDonough to Campbell letter was the "evidence" called for in the requirement laid on Rosie Grasswick on October 5, 1914, and that, therefore, the defendant Secretary of the Interior was in duty bound to entertain the motion for rehearing of his decision affirming that judgment of the Commissioner of the General Land Office, there was no obligation resting upon the defendant Secretary of the Interior to notify either Foltz or his counsel that such motion for rehearing had been entertained or to require Ranney to serve Foltz or his attorney with copy of whatever response he, Ranney, made to the motion and to the decision entertaining it, the provisions of Rule 83 of Practice before the land department to the contrary notwithstanding. (See paragraph X of the Bill, p. 8 of the Record.)

VII. That while the defendant Secretary of the Interior, after protest to him by counsel for Foltz against disregard of Rule 83 of Practice in cases before the land department, wrote such counsel assuring him that if any matter offered by Ranney in response to the motion for rehearing or to the decision entertaining such motion "may affect the rights of your client, you will be given ample opportunity to explain or refute it," no obligation rested upon the defendant Secretary of the Interior to redeem that pledge of his

official word to counsel for Foltz. That while the pledge of such official word was never redeemed, despite the fact that the matter presented by Ranney to the defendant Secretary of the Interior did "affect the rights of your client", there was no wrong done Foltz in and by the decision of the defendant Secretary of the Interior of November 27, 1917, which he rendered without opportunity to Foltz to examine or to be heard with respect to the new and *ex parte* matter which Ranney had injected into the Record, at the invitation and suggestion of the defendant Secretary of the Interior, and in the final stages of the proceeding between Foltz and Ranney in the land department. That there was more fancy than reality in Foltz's representations to the defendant Secretary of the Interior thereafter that such new and *ex parte* matter did not meet and fulfill the requirement made with respect to the Rosie Grasswick entry on October 5, 1914, did not operate to confirm said entry for patent under the proviso to section 7 of the Act of March 3, 1891 (26 Stat. 1095), and did not render mandatory utter disregard by the defendant Secretary of the Interior of the two preference rights of entry of the land vested in Foltz.

VIII. That the new and *ex parte* matter which the defendant Secretary of the Interior permitted Ranney to inject into the Record without notice to Foltz or opportunity to him to be heard with respect to it consisted of an affidavit by the President of the Teton County Canal & Reservoir Company, which stated in terms that it was made without reference by the affiant to the showing on the records of said company with respect to the certificate of water stock Rosie Grasswick claimed to own, and an unsworn statement by one Chas.

H. Campbell, agent for Ranney, and while such affidavit and unsworn statement were contradicted and refuted in every material particular by the affidavit of J. A. McDonough, attorney for the said company, by the affidavit of J. C. Bostron, Assistant Secretary of said company, and by the certified transcripts of certain judicial proceedings, all of which are referred to in paragraph XII of the Bill, pages 10 and 11 of the Record, and all of which were duly presented to the defendant Secretary of the Interior, it was held by him, notwithstanding, that the matter brought into the record by Ranney, without notice to Foltz, constituted due and satisfactory compliance with the requirement which was laid on Rosie Grasswick on October 5, 1914, operated to confirm her entry for patent under the proviso to section 7 of the Act of March 3, 1891, *supra*, and defeated the two preference rights of entry which had accrued to and were vested in Foltz.

Assignment of Errors.

If there is one of the ten specifications of error (pp. 18 to 21 of the Record) which is more helpful to the court than any other in perceiving the error committed in holding that the judiciary, the most dependable of all agencies of our Government for conservation of the rights of the people and needed restraint upon public officers and others who are prone to flout those rights, is afflicted with a paralysis that renders it helpless to prevent such wrongs to citizens as are shown by the facts alleged in the bill, it is believed that it is the second of the specifications in the assignment. That specification charges that the lower court failed to apprehend the most flagrant and lawless of

all of the flagrant and lawless acts of the defendants recited in the bill.

The second specification of error is that the lower court failed to understand that the defendant Secretary of the Interior in his evident desire to have his deliberations on the petition of mortgagee Ranney for reinstatement of the Rosie Grasswick entry partake of the nature of secret and Star Chamber proceedings, arbitrarily attempted and did expel from a suit pending before him one of the parties thereto, and that party the one who had appealed to him and whose motion for rehearing of his decision he had entertained. Not only did the Secretary of the Interior exclude such party from said suit, but that officer invited the other party thereto to make a new and different record in the case by the introduction of new and different *ex parte* testimony. In addition to that, the defendant Secretary of the Interior denied to Foltz an opportunity to be heard on such new and *ex parte* matter, and proceeded to a final determination of litigation between two parties with the door of an edifice dedicated to justice slammed against one of them to keep him out of the tribunal.

When persons, male or female, officials or private citizens, contemplate doing a wrong they may be expected to resort to expedients to make it appear that the wrong was done innocently and in circumstances and under representations or persuasions that tend to mitigate or condone the offense. If it was not the purpose and design of the defendant Secretary of the Interior in inviting Ranney to make a new and different record, and in denying to Foltz an opportunity to examine and question such new and different record, to make it appear that whatever action he took on

Ranney's petition for reinstatement of the Rosie Grasswick entry was taken without notice of the falsity of the new and different record Ranney was privileged to create, then what could possibly have been his purpose?

It is said that the ostrich pokes his head into the sand and confidently believes that when doing so he is beyond observation. Of course, he is not, nor is a public officer beyond the reach of process from the judiciary when he invites the defendant in a proceeding before him to secretly chloroform his senses with falsehoods and refuses to permit the plaintiff to prevent administration of the fumes or to resuscitate and revive him with the air of truth.

ARGUMENT.

Courts Have Jurisdiction When Law Has Been Flouted by Public Officers.

If the proposition or contention stated in the words of the title of this chapter is not true and sound, then we have in the United States a government wholly unsuitable as a government of the people, by the people and for the people, for if the head of an executive department of the government may arbitrarily disregard the plain and unmistakable provisions of laws conferring rights upon citizens, and arbitrarily destroy those rights, or make their exercise and enjoyment impossible, and in doing so defy not only the Congress but the Courts as well, we have a monster of autocracy as a master of the people and not a servant of the people, who has been hired and paid by them for the performance of labors as a servant.

It is true that mere errors of judgment on the part of a public officer in functioning with respect to matters within his jurisdiction will not suffice to cause the courts to correct the errors through and by injunctive process. Mere errors of judgment are not such a menace to the rights and liberties of the people as the pretense, hypocrisy and sinister purpose that are displayed when a public officer, who necessarily knows that he has trampled under foot not only the written law but the meaning thereof as he has himself interpreted it, comes into court to answer for his wrongs and does so alleging the wrongs resulted from exercise of his "judgment and discretion" and challenging the court to restrain or prevent their evil consequences.

We shall show hereinafter that these defendants necessarily knew and were conscious of the wilful wrongdoing alleged in the bill when such wrongdoing was perpetrated. We will show by citations to decisions of their own department that they acted contrary to those decisions in the Foltz-Ranney litigation without intending or pretending to recall or modify those decisions by their acts and conduct in the Foltz-Ranney litigation. When we have shown all that, it will be a duty inherent in the very nature of the judiciary, unless there be a vicious defect in our Government somewhere, to reverse the court below with instructions to it to enter a decree for the plaintiff in event of failure of the defendants to answer the Bill.

Law Flouted by Defendants in Reinstating Rosie Grasswick Entry.

We have searched in vain for authorities for our proposition that the mortgagee of Emil Grasswick, under his entry, had no interest by reason of such

mortgage in the subsequent entry of Rosie Grasswick and therefore had no standing, by reason of such mortgage, as a petitioner for reinstatement of the Rosie Grasswick entry. But the courts and the departments have not decided every conceivable question. All possible fool questions are not found answered in the opinions of the courts and departments, and it is doubtless because no person has been foolish enough to suppose that a mortgagee under John Doe's unperfected public land entry is also the mortgagee of every successive entryman of the same land, that no cases on the question are extant.

However, there are numerous authorities, some of which we will cite and all of which were known to the defendants when they deliberately wronged Foltz, to the effect that a mortgagee seeking reinstatement of his mortgagor's entry must be diligent (which Ranney was not) and must show the good faith of the mortgagor as an entryman (which Ranney did not).

“Again, he was guilty of great laches in prosecuting his case, and in the meantime adverse rights have intervened. He certainly knew of this judgment when he presented his first affidavit in August, 1886. He did not seek any relief then; his attorney simply filed his appearance and Gates' affidavit setting forth his interest. Thus the matter rested for six years, until July, 1892, when the present proceedings were instituted. In the meantime there have been two or three different entries and filings on the land, and one contest prosecuted to a successful termination, this appellant thereby earning a preference right of entry.” *United States et al. v. Hanley et al.*, 19 L. D., 186 at 187.

“Reinstatement of a canceled entry will not be made, where negligence, on the part of the applicant in the assertion of his claim appears, and an adverse right has intervened.” Syllabus; *Messer v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 26 L. D. 147.

“To entitle the appellant to a re-instatement of said entry the application should have set up such a state of facts as would have shown good faith on the part of the entryman. Nothing of the kind appears and your said decision denying the appellant’s application to reinstate said entry is affirmed.” *Manitoba Mortgage & Investment Co.*, 10 L. D., 566, at 568.

Ranney did not apply for reinstatement of his mortgagor’s entry, to wit, the entry of Emil Grasswick. He applied for the re-instatement of another, different and later entry, to wit, that of Rosie Grasswick, and he did not apply for reinstatement of it until after the rights of Foltz, the plaintiff, had accrued by reason of his contest against the entry of Clementine A. Shaw and his settlement upon the land.

“Right to reinstatement cannot be recognized where the adverse action has become final and the claim of another intervenes.” Syllabus, *Merritt v. Philip*, 16 L. D., 404.

“An entry canceled on relinquishment prior to issuance of final certificate, and the land entered by another, cannot be reinstated for the protection of a transferee who alleges that the relinquishment was in fraud of his rights, in the absence of evidence connecting the intervening entryman with such fraud.” Syllabus of *Gaitland v. Marsh*, 16 L. D. 140.

Defendants' Have Attempted to Destroy Foltz's Preference Rights as a Settler and as Successful Contestant.

The motion to dismiss Foltz's bill admonished the Court below against attempting to try a question of title to land in the State of Montana, and advised it that when patent issued under the Rosie Grasswick entry Foltz could sue her or Ranney, or both, in Montana with view to having either or both of them decreed trustees of the title for Ranney. Is there nothing of disrespect to an enlightened Court in such admonishment and advice?

The prayers of Foltz's bill ask for no decree quieting title. They ask for no decree making it mandatory on the part of the Secretary to allow Foltz's application for homestead entry of the land. They ask for no relief against Ranney. The prayers are for relief only to the extent of enjoining the consummation by the defendants of decisions and rulings which this Court will surely not fail to apprehend are arbitrary and in derogation of the vested rights of Foltz, and requiring them, when and after so enjoined, to proceed in the exercise of their legal discretion to consider Foltz's rights as a settler and as a successful contestant.

The essence of the bill is the showing therein that the defendants have created clumsily contrived, specious, flimsy barriers against the orderly progress of the Foltz application towards due action and decision thereon in the land department, which barriers, not because they are without warrant of law alone but because the defendants know them to be without warrant of law, Foltz asks this Court to compel the defendants to remove.

The motion to dismiss would have the Courts of the District of Columbia renounce their powers and disclaim their duty to rein-in and otherwise check a public officer when he takes the bit between his teeth and dashes hither and thither and anywhere except along the path of the law, in all cases where his performances benefit John Doe to the prejudice and at the expense of Richard Roe. And such renunciation and disclaimer by such Courts is asked and urged upon the ground that Richard Roe can receive belated recognition of his rights by the judiciary in another jurisdiction after the defendants have fully consummated their wrongs against Richard Roe in the District of Columbia. In short, the contention of the motion to dismiss is that a wrong done in the District of Columbia by a public officer functioning therein cannot be redressed through the processes of the Courts of the District of Columbia, when it is shown to be possible to have the wrong redressed by courts elsewhere at some indefinite time in the future. We have no uneasiness as to the distance this court will travel with the defendants on that vehicle of legal principle.

The character of Foltz's claim as a settler was described by the Department of the Interior in *Moss v. Dowman*, 19 L. D. 526. In that case the Department said:

“In view of these facts and that no evidence has been introduced which shows that Dowman's settlement was not made in good faith, under the established ruling of this Department, the settler Dowman's right attached instantly on the filing of Doran's relinquishment, and is therefore superior to Moss's entry.”

Moss v. Dowman went to the Supreme Court (176 U. S. 413) and by that tribunal it was said:

“In the case at bar every right which Doran possessed was ended on October 24, 1890, by the filing of his relinquishment in the local land office. The act of May 14, 1880, c. 89, 21 Stat. 140, provides: ‘That when a preemption, homestead or timber culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office.’

“At the moment of filing that relinquishment, Dowman, the defendant, was a settler in occupation of the tract and Moss, the plaintiff, made her application to enter, and the question is as to the relative rights, at the moment the land becomes open to entry, of one a settler in actual occupation and one making a formal entry in the land office. For reasons heretofore stated, we have no doubt that the settler is entitled to preference. It is true he must perfect his right of settlement by making an entry in the land office, and section 3 of the act of May 14, 1880, 21 Stat. 140, heretofore referred to, provides:

“‘That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the preemption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the preemption laws.’ ”

Is it conceivable that the defendants did not know the law as expounded in *Moss v. Dowman*? Of course they knew it, but they chose to ignore and disregard it, and, what is worse, are now before the judiciary defying and challenging it to do aught to disturb their "judgment and discretion" in flouting the law they knew so well.

As to the character of Foltz's preference right under the act of May 14, 1880, *supra*, as a successful contestant, the Department of the Interior has said:

"The right granted by said act is statutory and the land department has no authority, by regulation or otherwise, to disregard the act or deny the right." Henry Anderson, 46 L. D., 105.

Who will believe that the land department was guilty only of inadvertence or error of judgment in considering and acting upon Foltz's two preference rights in a manner contrary to the law as set out immediately above herein? Who is willing to be apologetic for the defendants to the extent of asking this court to believe that they did not know, when they decided the Foltz-Ranney controversy, of the Instructions of April 1, 1913 (42 L. D. 71) wherein the right of Foltz as a successful contestant is stated. The defendants knew the law, and knew it well, but they had the temerity to condemn it, thinking, possibly, that neither Foltz nor his counsel had either the intelligence or courage to assail their arbitrariness in the Courts.

CONCLUSION.

We submit that the averments of the bill, admitted by the motion to dismiss, constituted ample grounds

not only for granting all the relief for which Foltz prayed, which was limited relief only, but for such an opinion from the Court below on the devious methods and persistent arbitrariness of the defendants as would deter them from future wilful violations of due process and flagrant disregard of the true meaning of the law as well known to them.

Respectfully submitted,

PATRICK H. LOUGHRAN,
Counsel for Appellant.

DISTRICT OF COLUMBIA
FILED

MAR 24 1920

Henry C. Hughes
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No. 3355

In the Court of Appeals of the District of
Columbia.

JANUARY TERM, 1920.

LEO L. FOLTZ, APPELLANT,

v.

JOHN BARTON PAYNE, SECRETARY OF THE INTERIOR,
AND CLAY TALLMAN, COMMISSIONER OF THE GEN-
ERAL LAND OFFICE.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF
COLUMBIA.

BRIEF AND ARGUMENT FOR APPELLERS.

CHARLES D. MAHAFFEY,

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C. EDWARD WRIGHT,

Assistant Attorney.

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In the Court of Appeals of the District of Columbia.

JANUARY TERM, 1920.

LEO L. FOLTZ, APPELLANT,	} No. 2355.
v.	
JOHN BARTON PAYNE, SECRETARY OF the Interior, <i>et al.</i>	

BRIEF AND ARGUMENT FOR APPELLEES.

This is an appeal from a decree dismissing the bill of complaint, the issue below being upon appellees' motion to dismiss for reasons set forth on pp. 15-16 of the Record. The bill thus dismissed was an amended bill. The original bill was in substance the same as the amended bill, but joined thereto as codefendant one Ebenezer G. Ranney, a citizen of New York. The record (p. 18) shows that April 5, 1918, appellant took out order of service by publication on said Ranney; that proof of publication was filed May 18, 1918; and that, June 4, 1918, Ranney, specially appearing by counsel for that purpose only, moved to vacate the purported service on him for the reason that the writ had for its immediate object the establishment of an alleged right to

real estate situate, not in this District, but in Montana, and that there was no authority of law for such substituted service. June 21, 1918, the Supreme Court granted that motion and vacated the service on Ranney. Thereupon, appellant filed this amended bill, omitting Ranney as a party.

STATEMENT OF THE CASE.

In 1910 one Emil Grasswick made desert-land entry of the land in controversy and, jointly with his wife, Rosie, executed a mortgage thereon to Ranney. Thereafter Emil relinquished as entryman, and Rosie made entry under the same law. (Record, pp. 3-4.) Rosie made final proof on her entry January 6, 1913 (Record, p. 5), and January 22, 1913, final certificate issued to her. In her final proof she presented, as acquired by purchase, a certificate of stock in the Teton County Canal & Reservoir Co. entitling her to water for the irrigation of the land. A report came to the General Land Office to the effect that 1,000 shares of stock in this company had been issued in an irregular manner and that the company did not intend to recognize them until the question of the legality of ownership was decided by the court. In the list of stock thus challenged was certificate No. 2528, issued to T. C. Withee and claimed by Rosie as evidence of her water right. There was no question as to her ownership by assignment of said certificate, but the worth of the certificate as carrying a valid obligation on the part of the company to furnish the water was in doubt as the result of this

report. Hence, on October 5, 1914 (Record, p. 5), the General Land Office laid a requirement on Rosie to furnish evidence that a court of competent jurisdiction had recognized the said "share of stock as evidencing a legal interest" in the company, or to furnish other stock not in dispute, or to apply for an extension of time within which to submit such evidence as part of her final proof. This was well within the two-years period (Act of March 3, 1891, section 7, *proviso*), and the Department had an unquestioned right to make that requirement.

But when Rosie was served with it, she promptly filed a relinquishment November 5, 1914. (Record, p. 4.)

This would have been the end of the entry but for the fact that Rosie's relinquishment was in derogation of the rights of Ranney as mortgagee. The bill presents only fragments of what would be an orderly story if told in narrative form. It sufficiently appears from the bill, however, that Ranney came in, as he had a right to do as mortgagee under the rules and decisions of the Department (*In re Gimbel*, 38 L. D. 198, 200), seeking and being allowed subrogation.

Before proceeding with the essential story, the Foltz interlude needs some description.

On the day Rosie filed her relinquishment (November 5, 1914) a woman named Shaw filed a homestead application for the land. (Record, p. 2.) April 29, 1916, Foltz filed an affidavit of contest against the

Shaw entry. May 27, 1916, Shaw relinquished, and on the same day Foltz filed his relinquishment.

If Rosie, or the party who in her stead had the right to satisfy the requirement of October 5, 1914, furnished the necessary proof of the validity of the water certificate as an obligation of the company to furnish the water for which it called, a patent, by force of the proviso to section 7 of the act of March 3, 1891, must issue, as such requirement, which challenged the validity of the final proof in only the one respect hereinbefore shown, was the sole requirement laid on the entrywoman within the two-year period. Hence, if that requirement be met, the land was at no time, either when Shaw or Foltz attempted their entries, public land of the United States.

How, then, did Foltz get into the case between Rosie (Ranney by substitution) and the United States? In an effort to draw a bill that would reveal only such facts as appellant conceived were favorable to himself, he singularly omits to state any connection between himself and the Grasswick-Ranney case. He says that he contested the Shaw entry. Ranney had nothing to do with that entry. Shaw acquired no rights in the land if this be a case where the Grasswick entry stands confirmed under the act of 1891 by compliance with the only lawful requirement laid on the entrywoman. Foltz acquired nothing by a contest against Shaw or by her relinquishment if Shaw had nothing.

Foltz's entire case is based on his allegations in paragraph 5 of his bill—that appellees have “arbi-

trarily" denied recognition of his "vested right." How did this right become justiciable before these officers in any proceeding to which he was a party? The bill does not show. We are told in the bill that some sort of a proceeding was going on in the Land Department in which Rosie and Ranney were concerned. He speaks of filing motions and of taking appeals, and on page 8 of the record, he complains that a showing was made by Ranney without service on him and (p. 9) that a case was treated as *ex parte* which "for years" before 1917 had proceeded *inter partes* (Foltz's first connection with the land, on his own showing, was in April, 1916). Indeed, his whole case, as it developed in the lower court, narrowed down to the simple question as to whether he had due process of law—and this in a case where the bill on its face fails to show him related in any respect as a party to the proceeding involving Ranney and Grasswick, or entitled to any sort of process in that proceeding. Was he there as intervener, or as friend of the court, or as a contestant? This record does not show.

The bill does disclose that something was going on in the Department involving Ranney. To resume the narrative at the point of injection of this Foltz interlude, it appears, September 11, 1916, Ranney having been permitted to stand in Rosie's stead in respect to her entry, the General Land Office held that Ranney must show that the stock certificate filed by Rosie had been recognized by a court as

evidencing a legal right in the company, or to furnish stock not in dispute (Record, p. 6); or, in other words, he was to fulfill exactly that requirement made of Rosie October 5, 1914. The bill does not show what had been proceeding during the two years, except that (Record, p. 12) a final decree had been signed January 28, 1915, by the judge of a District Court in Montana, in a suit for the foreclosure of this mortgage, brought by Ranney against Emil Grasswick and others.

Ranney thereupon filed the letter from the attorney for the water company, which appears on page 7 of the record. This letter was not a decision of a court of competent jurisdiction, but it was adjudged sufficient for its purpose by the General Land Office December 18, 1916. It showed that the validity of the certificate had been contested by the company, but as the result of a compromise had been recognized. This was in accord in the facts afterwards shown in another manner. There was no question raised timely in the Department as to Rosie's ownership of this stock; it was merely a question as to whether the company, voluntarily or involuntarily, had admitted its obligation as evidenced by the certificate. In paragraph 9 of the bill (Record, p. 7) appellant avers that the decision of December 18, 1916, was an "arbitrary judgment" to the effect that the attorney's letter constituted proof that Rosie was the owner of the stock. This is not supported by the record; and as shown, was not an issue made by any proceeding had or requirement made

within two years from the date of the receiver's receipt on final entry. Appellant says (Record, p. 8) that he appealed from this decision and that it was affirmed by the Secretary June 7, 1917, although not even here does he show how he was related to that case or was entitled, if he was, to an appeal. Yet in paragraph 10 (Record, p. 8) he says that he filed a motion for rehearing and that, August 13, 1917, the Secretary set aside the decision and called upon Ranney for further proof showing the facts and circumstances of the compromise, etc. Ranney responded to the call and furnished the showing required under this rule. November 27, 1917 (Record, p. 9), the Secretary denied Foltz's motion and held that the Grasswick entry had been confirmed for patent under the proviso to section 7 of the act of March 3, 1891, and that the mortgagee was entitled to have issued a patent for the entry in the name of the entrywoman.

At this point is introduced the burden of Foltz's complaint. He says that when the Secretary, August 13, 1917, reopened the matter and required a more specific showing from Ranney, he was not served with a copy; that he learned of it, however, and filed a motion that Ranney should be required to serve him with a copy of whatever further showing he made; that the Secretary declined to pass such an order, although assuring appellant that if it developed anything affecting his rights, he should have ample opportunity to explain or refute it; that he was not

given such opportunity; and that this (Record, p. 9) constitutes lack of due process of law.

Again we remind the court that appellant has not shown that he was a party to that cause entitled to notice or to any opportunity to be heard as a matter of right as a party. You may as easily infer from anything appearing in the pleadings that Foltz was an eager, interested looker-on, ready to do anything that would cause a decision adverse to Ranney, so that, the Grasswick entry being disposed of, he could step in as the first entryman or settler, or a friend of the court anxious to see that Ranney did not impose upon the Land Department, as to infer that Foltz was one party to a cause pending in the Department with Ranney as the other party, and therefore entitled as matter of right to everything which due process of law gives to a party. But he makes no averment enlightening on that point.

In paragraph 11 of the bill (Record, p. 9) Foltz states that the showing made by Ranney was "unresponsive to said rule, was patently in evasion of the command of said rule, was insufficient, misleading, deceitful, and false," etc., etc. Of course, these are mere conclusions of the pleader. It would seem as though the Land Department had jurisdiction to pass upon the showing made and to adjudge whether or not it was responsive and sufficient and truthful. At least it did. Ranney furnished the statement of the president of the water company. Foltz gives his version of it on page 10 of the record. It discloses that the president said that the decree

of a Montana court in *Bogart v. The Company* "validated said certificate 2528 as a lawful interest in said company." He did not say that that particular certificate was involved in that particular suit. We know that it was not. On page 12 of the record, among the matters of evidence filed by appellant in the manner shortly to be noticed, we find that the Bogart suit involved another share of stock passing through Withee's hands. Bogart's suit was to impel acknowledgment of its validity in the hands of an innocent purchaser. It does not require a Solomon to conceive that certificate 2528, similarly situated, was "validated" as the result of this suit in a test case.

Indeed, we know (Record, p. 11) that on January 30, 1915 (two years after Rosie Grasswick presented certificate 2528, as assigned to her by Withee, in connection with her final proof), one Gust Hower sued the company in relation to this stock, alleging that he had purchased it from Withee "without any knowledge whatever of conflicting interests" and that this suit was not prosecuted, but was later dismissed. And we also know from the statement of the attorney for the company that the company, after having contested the validity of this and other stock "in similar situation," entered into a compromise whereby the validity of certificate 2528 as an obligation of the company was recognized. It matters not that Hower claimed to be the owner of this certificate in 1915. Rosie as a transferee possessed such necessary indicia of ownership of this stock in 1913 that the Land

Department never questioned her ownership of it or, within the two years' period, laid any rule on her or on Ranney requiring further proof of ownership. The point was, conceding she owned it, whether it was good for what it purported to represent.

Foltz complains that the Department did not give him opportunity to file the papers which he describes on pages 10-12 of the record. Yet on page 10 he shows that he availed himself of a right to petition the Secretary, and did file such a petition and attached to it all this evidence, with the result that even thereafter, on December 21, 1917, the Secretary still adhered to his decision of November 27, 1917, holding, treating, and regarding "such irrefragable proof of the falsity" of Ranney's showing "as without effect to cause him to recede from his groundless ruling." In less hectic English, this means that the Secretary was not as much impressed by Foltz's showing as Foltz's counsel was, and decided that it was insufficient for the purpose for which it was introduced. The court will perceive that such of this evidence as is pertinent really goes to the question of Rosie's ownership of the stock and not to the main, and the only, question which the Department had retained jurisdiction to decide.

So, in conclusion of this statement, we find that Foltz in a bill wherein he fails to show that he was a party to a proceeding against the Grasswick entry with Ranney adversely interested as a party, complains that he was not given opportunity to introduce evidence and be heard, and winds up with a showing

that, after all, he did get the evidence before the Secretary and was heard.

The real trouble is that the appellees decided contrary to appellant's views of the facts and the law. He says in paragraph 15 (Record, p. 13) that he has exhausted his rights of appeal, review, rehearing, and petitioning in the Department so that "his only remaining remedy is by appropriate *appeal to the courts* for relief from the *erroneous findings of fact and rulings in matter of law*" in the Department.

He has aptly described this case in that paragraph.

ARGUMENT.

The ultimate relief sought is a mandatory injunction requiring the appellees to vacate their decisions so far as they adjudge that Ranney has met the requirements of the decisions of October 5, 1914, September 11, 1916, and August 13, 1917, and so far as they also adjudge that the Grasswick entry is "confirmed" for patent under the act of 1891. Following that, the appellees are to take up Foltz's application for the land with this Grasswick entry out of the way.

The Department made certain requirements which it is not disputed it had a right to make; the party on whom the same were laid responded; the Secretary decided that the showing met the requirements; Foltz says they did not. Foltz or his counsel not having yet been appointed to the position of head of the Land Department so as to be able to make their judgment effective, nothing is left for them but an "appropriate appeal to the courts."

The premise may be quite sound; the trouble is with the logic: the conclusion confuses a direct appeal to the courts which they may not make with an appeal to a court after patent issues whereby they seek to impress such a patent with a trust in Foltz's favor.

We urge:

(1) That the record discloses nothing other than an attempt to secure a direct review of decisions rendered in the Land Department, involving the exercise of judgment and discretion, without any challenge to the jurisdiction or showing that the same were arbitrary or rendered without due process of law.

(2) That no irreparable injury or damage is shown because it is perfectly apparent that if Foltz has any rights in the land, of which he has been deprived through erroneous rulings made by the Land Department, he has the usual and wholly adequate remedy of a suit against our patentee.

(3) That it is apparent from the pleadings that this case is proceeding in the absence of an indispensable party.

We might add generally what we think the statement of the case exhibits—lack of equity is shown on the face of the bill.

I.

The Court Has No Jurisdiction Directly to Review the Appellees in Matters Involving the Exercise of Judgment and Discretion and Within the Jurisdiction of the Land Department.

This is elementary. The court will consider a challenge to the jurisdiction of the Land Depart-

ment, as in the *Hoglund* case. There is no such challenge in this case.

The court will enquire into a decision to the extent of ascertaining whether it be arbitrary or not. No such showing is made here. True, in paragraph 5 of the bill, appellant says the appellees' actions and decisions were arbitrary. This merely states a conclusion. No specific facts to support the conclusion are alleged anywhere in the bill. The allegation is to be disregarded. (*Collins v. Johnston*, 237 U. S. 502, 507.)

The court will see to it that due process of law has been afforded. Appellant avers in this case that he did not have due process because the Secretary permitted Ranney to make a showing without according him a day in court. This would be, indeed, quite serious—if it were so. It was the only point on which the trial court signified a desire to hear counsel for appellant. While no written opinion was filed, the attitude of the court was this: What the Secretary juridically determined in a matter within his jurisdiction did not concern the court because he could not review the Secretary and substitute his judgment for that of the appellees; the sole question was, in rendering that judgment, did the Secretary accord Foltz an opportunity to be heard? When he became satisfied that Foltz had nothing of which to complain in respect to due process, he dismissed the bill.

In the first place, as we have repeatedly shown, Foltz in his bill fails to show that he was a party to

the proceeding involving Ranney and Rosie Grasswick. He connects himself with the land and with the Shaw entry, to be sure. He does not aver that he formally contested the Grasswick entry. He does not show any connection with the land until after three years from the time Rosie made final proof and received the final receipt. So, at the outset, he has failed to exhibit in his bill any right to be heard at all in the proceeding to which Rosie and Ranney were parties.

And yet he was heard. On his own showing, made in whatever capacity he assumed—as friend of court, as party, or as an outsider with an interest in seeing the Grasswick entry canceled—he did appear; he did file all this evidence so persuasive with him and so unpersuasive with the appellees; he was heard not only in respect to it, but to what he called the insufficient showing made by Ranney, and the Secretary considered it all and adjudged it insufficient to overturn the showing made in behalf of the entry.

II.

No Irreparable Injury Is Shown—Appellant's Remedy, if the Appellees Have Committed Error of Law, Is a Suit Against the Government's Patentee.

The bill shows that the Land Department unless restrained will issue patent under Grasswick entry for the use and benefit of the mortgagee.

This suit is premature. If the issue of patent is due to erroneous rulings in matters of law to the detriment of Foltz, he can bring suit in a court of

the vicinage against Grasswick or Ranney, and, if he be entitled, the court will decree that the patentee holds his patent in trust for Foltz. In such a situation the courts will not interfere with a case while pending in the Land Department. (*Minnesota v. Lane*, 247 U. S. 243, 250; *U. S. ex rel. Hall v. Lane*, 47 Wash. Law Repr. 50.)

III.

Ranney Is an Indispensable Party, in Whose Absence the Court Should Not Grant the Relief Prayed In the Bill.

Nowhere in the bill will be found any averment that Foltz did not know of Ranney's interest from the inception of appellant's connection with the land, which (Record, p. 2) was April 29, 1916—more than a year after Ranney had secured a final decree of foreclosure (January 28, 1915), as elsewhere appears in the bill. Ranney's mortgage was taken at a time when Emil, Rosie's husband, was the entryman. One of the errors committed by the appellees, according to appellant, was in treating Rosie's entry as subject to this mortgage. The mortgage is not in the record. The court is advised by the appellant, however, that Rosie "joined with him (Emil) in the execution of the said mortgage to the said Ranney" (Record, p. 4) "for the purpose of waiving and releasing her dower rights or other rights as a married woman under the laws of Montana." This latter, of course, is the pleader's conclusion. The main fact is that the mortgage was a joint mortgage. The laws of Montana (II Code, section 1670 *et seq.*)

provide that where the land is a homestead, the wife must join in a deed as a principal. The instrument must be joint.

Now Ranney's interest in this land under the Grasswick entry has been recognized by a Montana court and by the department. On a bill too meager to advise you of all the facts and of all the reasons, it sufficiently appears that the Land Department has held the Grasswick entry to be "confirmed" in the sense that by operation of the proviso to section 7 of the act of March 3, 1891, the appellees owe the mere ministerial duty of issuing a patent.

The bill, as we have shown, seeks a decree vacating this judgment and casting out the Grasswick entry so as to clear the way for the consideration of Foltz's application to enter. In other words, you are calmly to proceed in the absence of Ranney or Grasswick, wipe out the Grasswick entry, destroy Ranney's rights, and place Foltz in the position of being the only person with an existing claim to the land. The court is to do these things at appellant's instance without giving Ranney opportunity to be heard, notwithstanding the fact that appellant's principal bid for sympathetic consideration in his bill is a self-refuted allegation that he himself was not afforded such opportunity in the Land Department. That Ranney would have much to say is apparent from the manifest incompleteness of the bill as a statement of the whole case.

Appellant himself recognized that Ranney was a necessary and indispensable party in his original bill

and tried to bring him into the case on substituted service. The court quashed that service on the ground that the suit had for its immediate object the establishment of an alleged right in real estate situate beyond the jurisdiction of the court, Ranney himself being not within the jurisdiction of the court.

Rule 18 of our Equity Rules prescribes that in cases where it appears that persons who might be decreed "proper parties to the suit" can not be made parties by reason of being out of the jurisdiction of the court, the court may proceed without making them parties, but the decree shall be without prejudice to the rights of the absent parties.

It is our contention that Ranney is more than a proper party—that he is an indispensable party in whose absence the court can not proceed to the decree prayed in the bill or to grant any relief within the theory of the bill without prejudice to Ranney's rights.

Our Rule 18 is Rule 39 of the revised Equity Rules prescribed by the United States Supreme Court in 1912. Prior to that revision, there was a rule (47) which read "persons who might otherwise be deemed *necessary* or proper parties to the suit." In the revision the words "necessary or" were intentionally omitted—stricken out by Mr. Justices Van Devanter and Lurton, we are advised.

In *Shields v. Barrow* (58 U. S. 130, 139) the court thus describes parties to an equity suit:

They are: 1. Formal parties. 2. Parties having an interest in the controversy, and who ought to be made parties, in order that

the court may act on that rule which requires it to decide on, and finally determine, the entire controversy, and do complete justice by adjusting all the rights involved in it. These persons are commonly termed *necessary* parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree and do complete and *final* justice without affecting other persons not before the court, the latter are not *indispensable* parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree can not be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

Needless to say No. 3 describes an indispensable party—such as we contend that Ranney is. If the relief prayed be granted, Ranney's rights are summarily destroyed without his being heard in defense of those rights.

See also *Minnesota v. Northern Securities Co.* (184 U. S. 199); *Chadbourn v. Coe* (51 Fed. 479, 481); *Kelly v. Boettcher* (85 Fed. 55); and *Backus Co. v. Simonds* (2 App. D. C. 290).

We submit that all our reasons for the dismissal of the bill fit together admirably: An indispensable party is absent and can not be made a party (and if he were, it would mean simply a transfer of the same controversy that was before the Land Department

to the court which has no jurisdiction to sit as a reviewing tribunal); but in a suit against that absent party, plaintiff in a court having jurisdiction where the land is situate may proceed directly against that party, who will then have an opportunity to defend, and, if this appellant be entitled by reason of anything set up in or omitted from this bill to the land, can secure a decree adjudging our patentee a trustee of the title for him.

CONCLUSION.

The statement on page 19 of the appellant's brief that Ranney did not apply for reinstatement of the Grasswick entry until "after the rights of Foltz, the plaintiff, had accrued by reason of his contest against the entry of Clementine A. Shaw and his settlement upon the land" is not supported by any allegation in the record, and, as matter of fact, is wholly untrue.

Moss v. Dowman (176 U. S. 413), if in point, tells against the appellant's contention. Doran made a homestead entry May 7, 1890, but did not enter into occupation. Dowman went into actual occupation as a settler September 19, 1890, and made formal application for entry November 18, 1890. After five years' residence he made proof and received a patent. In the meantime, October 24, 1890, Doran had relinquished to Moss, who appeared upon the land April 22, 1891, although she had filed an application to enter subsequent to Dowman's actual settlement. The Land Department decided in favor of Dowman, and the court held the decision to be correct.

In this case Foltz did not appear on the scenery until long after the mortgagee's rights had attached. It is one thing to relinquish a right in which the party alone is concerned; it is entirely a different thing when one attempts to relinquish a right in which another party is concerned, in derogation of that interest, and in attempted fraud of that right.

We submit that the decree should be affirmed.

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